Volume 71 Number 2

Federal PROBATION
a journal of correctional philosophy and practice

Our Journey Toward Pretrial Justice [1]

Marie VanNostrand, Ph.D.
Gena Keebler
Luminosity, Inc.

Pretrial Justice—The honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance. [2]

IN RECOGNITION OF the 25th Anniversary of the Pretrial Services Act of 1982, it seems particularly appropriate to reflect on the progress of our journey toward pretrial justice and to identify strategies to accelerate its achievement.

In order to effectively assess our progress in achieving pretrial justice, it is critical to understand the pretrial stage of the criminal justice system, including the bail decision, the rights of accused persons awaiting trial, and the role of pretrial services. We will begin with a review of the basics. The period of time between arrest and case adjudication is known as the pretrial stage. Each time a person is arrested and accused of a crime, a decision must be made as to whether the accused person, known as the defendant, will be released back into the community or detained in jail awaiting trial. A critical part of the pretrial stage is the bail decision—the decision to release or detain a defendant pending trial and the setting of terms and conditions of bail. The bail decision is a reflection of pretrial justice; it is the primary attempt to balance the rights afforded to accused persons awaiting trial with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance. Pretrial services agencies perform critical functions related to the bail decision, thereby contributing to pretrial justice. They serve as providers of the information necessary for judicial officers to make the most appropriate bail decision. They also provide monitoring and supervision of defendants released with conditions pending trial. Additional information below regarding bail, the rights of accused persons awaiting trial, and the role of pretrial services agencies is provided as a foundation for assessing our progress toward pretrial justice.

back to top

Bail in the United States

For the majority of our history the sole consideration when deciding bail was the risk of failing to appear in court. The first major federal bail reform occurred in the form of the Bail Reform

Act of 1966. The key provisions of the Act that relate directly to understanding bail today include:

1. The presumption of release on recognizance for defendants charged with non-capital crimes unless the Court determined that such release would not assure court appearance.
2. Conditional pretrial release, supervision of released defendants, with conditions imposed to address the risk of flight.
3. Restrictions on money bail, which the Court could impose only if non-financial release options were not enough to assure appearance. [3]

The Bail Reform Act of 1966 reinforced that the sole purpose of bail was to assure court appearance and that the law favors release pending trial. In addition, the Act established a presumption of release by the least restrictive conditions, with an emphasis on non-monetary terms of bail.

In the early 1970s, the District of Columbia became the first jurisdiction to experiment with detaining defendants due to their potential danger to the community if released pending trial. Under D.C. Code 1973, 23-1322, a defendant charged with a dangerous or violent crime could be held before trial without bail for up to 60 days; this practice became known as preventive detention. This detention scheme was upheld by the District of Columbia Court of Appeals in *United States v. Edwards*. [4] The change in law in the District of Columbia followed by *United States v. Edwards* paved the way for the next major bail reform.

The Bail Reform Act of 1984 was, in part, created in response to the growing concern over the potential danger to the community posed by certain defendants released pending trial. Following the lead of the District of Columbia as upheld in *United States v. Edwards*, the 1984 Act retained the presumption of release on the least restrictive conditions found in the 1966 Act, while allowing for detention of pretrial arrestees based on both court appearance and danger to the community. Preventive detention as detailed in the Act allows for pretrial detention in cases when a judicial officer finds that no conditions or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.

The preventive detention aspect of the Bail Reform Act of 1984 was challenged and upheld in the U.S. Supreme Court case *United States v. Salerno* in 1987. In *United States v. Salerno*, the Court decided that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. What is just as important as upholding preventive detention is the context in which the decision was made. The opinion for the Court provided by Chief Justice Rehnquist emphasized that the federal statute limits the cases in which detention may be sought to the most serious crimes; provides for a prompt detention hearing; provides for specific procedures and criteria by which a judicial officer is to evaluate the risk of "dangerousness"; and (via the provisions of the Federal Speedy Trial Act of 1974) imposes stringent time limits on the duration of the detention. [5]

The Bail Reform Acts of 1966 and 1984 only apply to the federal court system, but most states have followed suit and currently there are at least 44 states and the District of Columbia that have statutes listing both community safety and the risk of failure to appear as appropriate considerations in the bail decision. [6] Bail, as it stands today in most states and the federal court system, serves to provide assurance that the defendant will appear for court and not be a danger to the community pending trial. There remains a legal presumption of release on the least restrictive terms and conditions, with an emphasis on nonfinancial terms, unless the Court determines that no conditions or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.

back to top

Rights of Accused Persons Awaiting Trial

Accused persons enjoy certain inalienable rights during the pretrial stage. These rights can be found in the Constitution of the United States, case law, and state and federal statutes and include the following:

1. Presumption of Innocence
2. Right to Counsel
3. Right Against Self-incrimination
4. Right to Due Process of Law
5. Right to Bail that is Not Excessive
6. Right to a Fair and Speedy Trial

The six rights listed above are not fully inclusive of all of the rights afforded to a defendant during the pretrial stage. There are many other legal protections provided during this stage, including but not limited to the requirement of a probable cause hearing within 48 hours, the right to confront witnesses, and the right to equal protection under the law. It is beyond the scope of this article to discuss all of the rights afforded to pretrial defendants; however, the Presumption of Innocence, Right to Due Process of Law, and Right to Bail that is Not Excessive are at the heart of pretrial justice and deserve further discussion.

Presumption of Innocence
The presumption of innocence dictates that a formal charge against a person is not evidence of guilt; in fact, a person is presumed innocent and the government has the burden of proving the person guilty beyond a reasonable doubt. This fundamental principle can be found in case law dating back to 1895, when Justice White wrote in his opinion for the Supreme Court in *Coffin v. United States*, "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." [7] Although the presumption of innocence is not founded in the Bill of Rights of the United States Constitution, it is considered an undisputed and fundamental principle of American jurisprudence.

Right to Due Process of Law
The Fifth Amendment of the U.S. Constitution states that "No person shall be…deprived of life, liberty, or property, without due process of law …." while section one of the Fourteenth Amendment states that "No State shall … deprive any person of life, liberty, or property, without due process of law…" The Due Process Clause of the Fifth Amendment applies to the Federal Government and the Fourteenth Amendment applies to the States. Both amendments provide that the government shall not take a person's life, liberty, or property without due process of law.

A clear definition of due process is lacking; however, Justice Frankfurter paints a picture of due process in his 1950 dissenting opinion for the Supreme Court in *Solesbee v. Balkcom*, which states: "It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just." [8]

As it relates to restricting a pretrial defendant's liberty, due process requires, at a minimum, that the defendant receive the opportunity for a fair hearing before an impartial judicial officer, that the decision to restrict liberty be supported by evidence, and that the presumption of innocence be honored.

Right to Bail that Is Not Excessive
The right to bail that is not excessive was established in the Judiciary Act of 1789 and the Eighth Amendment of the U.S. Constitution, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The scope and intent of "excessive bail" has been clarified over time with a few critical changes in law and U.S. Supreme Court case decisions, as discussed in the previous section, *Bail in the United States*.

As noted earlier, for the majority of our history the sole consideration when deciding bail was

the risk of failing to appear in court. This was reiterated in the U.S. Supreme Court case of *Stack v. Boyle*, decided in 1951, likely the most notable court case that addresses the Eighth Amendment right to bail that is not excessive. Chief Justice Vinson writes in his opinion for the Court that "From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedures, Rule 46(a) (1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.… The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.... Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." [9]

As discussed previously, the Bail Reform Acts of 1966 and 1984 were followed by a challenge to the preventive detention aspect of the Bail Reform Act of 1984 via *United States v. Salerno* in 1987. The United States Court of Appeals for the Second Circuit initially struck down the preventive detention provision of the Act as facially unconstitutional, because, in that Court's words, this type of pretrial detention violates "substantive due process." As a result, the Supreme Court granted certiorari because of a conflict among the Court of Appeals regarding the validity of the Act. The Supreme Court then reversed the Court of Appeals and held that the Act fully comported with constitutional requirements. The Court decided that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. It is critical to recognize, however, that the Court stated in its opinion "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." [10]

Bail, as it stands today in most states and in the federal court system, serves to provide assurance that the defendant will appear for court and not be a danger to the community pending trial. Bail set at an amount higher, or with conditions more restrictive than necessary to serve those purposes, is considered excessive.

back to top

The Role of Pretrial Services

The field of pretrial services emerged in response to the inequities of the traditional money bail system as well as judicial officers' needs for reliable information to make bail decisions. [11] For this reason, pretrial services agencies provide information to assist judicial officers in making the most appropriate bail decisions. They also provide monitoring and supervision of defendants released with conditions pending trial. The Manhattan Bail Project, a project initiated by the Vera Institute of Justice in 1961, was one of the first and potentially best-known pretrial services agencies in the United States. Pilot pretrial services agencies were authorized in 10 federal judicial districts in 1974 as a part of the Speedy Trial Act. In 1982 the Pretrial Services Act was passed, which authorized the expansion of pretrial services from the 10 pilot districts to every federal judicial district. Since that time pretrial services agencies have been developed across the country and there are now agencies operating in more than 300 counties and all 94 districts in the federal court system. [12]

back to top

Assessing Our Progress Toward Pretrial Justice

The most significant challenge to assessing our progress toward pretrial justice is determining the most appropriate measures. There are admittedly dozens of ways to measure the many components and subtle aspects of pretrial justice. Measuring the criminal justice system's compliance with one or more of the legal rights afforded to a pretrial defendant awaiting trial or measuring court appearance and community safety rates are just a few ways this could be accomplished.

To begin the discussion of measuring our progress toward pretrial justice, we chose a

measurement that reflects many of the components of pretrial justice. We examine our progress toward pretrial justice by assessing whether or not our system operates as Chief Justice Rehnquist wrote for the majority in *United States v. Salerno* in 1987: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." It is important to recognize that this case was decided after the Bail Reform Acts of 1966 and 1984 and, in fact, upheld the challenge to the preventive detention aspect of the 1984 Act. For this reason, this statement provides an appropriate measure of pretrial justice today and the results will serve as a reflection of our progress toward pretrial justice. Examining pretrial release and detention rates as well as the population of our jails in this country is a reliable way of determining whether liberty is the norm and detention awaiting trial the carefully limited exception.

Release and Detention Rates in U.S. District Courts

The United States district courts are the trial courts of the federal court system. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. In addition, three territories of the United States (Virgin Islands, Guam, and the Northern Mariana Islands) have district courts that hear federal cases. The Administrative Office of the U.S. Courts publishes a Judicial Business of the United States Courts Annual Report of the Director. These reports can be found online (www.uscourts.gov/judbususc/judbus.html) and are available for fiscal years 1997 to 2006.

An examination of the 2006 annual report reveals that the U.S. district courts handled 82,508 cases (defendants) during the 12-month period ending September 30, 2006. Of those cases, 39 percent of the defendants were released at some point awaiting trial. Conversely, 61 percent of all defendants were detained during the entire pretrial stage. It should be noted that rates varied by circuit and district in the U.S., excluding U.S. territories, and ranged from a high of 74.5 percent released in Vermont to a low of 11.2 percent released in Arizona. During fiscal year 2006 the Administrative Office of the U.S. Courts reported these statistics excluding immigration cases for the first time. When excluding immigration cases the release rate for all courts increased to 47.3 percent, with release rates ranging from a high of 76.3 percent in Vermont to a low of 23.8 percent in the Southern District of California. Even after removing the immigration cases, the average detention rate in all U.S. district courts during fiscal year 2006 was over 50 percent.

Release and detention data for the U.S. district courts from fiscal years 1992 to 2006 provided by the Administrative Office of the U.S. Courts were analyzed to identify trends in these rates over the past 15 years. The combined release and detention data are presented in Figure 1.

As can be seen in Figure 1, release rates have gradually decreased over the past 15 years, while detention rates have increased. In fact, defendants released awaiting trial averaged a high of 62 percent in 1992 and decreased to a low of 39 percent by 2006. Figure 2 shows the same data from another viewpoint.

Release and Detention Rates in State Courts

Comprehensive release and detention rates, like those reported by the federal courts, are not available consistently for state courts across the country. Since 1988, however, the Bureau of Justice Statistics has sponsored a biennial data collection on the processing of felony defendants in the state courts of the Nation's 75 most populous counties. [13] In 2002 the 75 largest counties accounted for 37 percent of the U.S. population. A review of the state court processing statistics identified state court release rates of 62 percent (38 percent detention rate) in 2002. Interestingly, the rates have fluctuated only slightly between 1992 and 2002, ranging from 62 percent to 66 percent (see Figure 3).

U.S. Jail Populations

In addition to release and detention rates in the federal and state court systems, it is interesting to consider the make-up of jails in this country when assessing our progress toward pretrial justice. Jails are locally operated correctional facilities that confine persons before or after case adjudication. Accused persons awaiting trial and offenders sentenced to usually one year or less

are incarcerated in jails. According to the Bureau of Justice Statistics, as of midyear 2005 there were nearly 750,000 persons incarcerated in local jails on an average day in this country, and of those, 62 percent are defendants being detained pending trial. [14] An analysis of the jail populations for the 10 years between 1996 and 2005 reveals an increase in the percent of the population awaiting trial from 51 percent in 1996 to 62 percent in 2005 (see Figure 4).

Pretrial Justice: Are We on the Right Path?
"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception" (Rehnquist, 1987).

Liberty pending trial equates to pretrial release. In the federal court system in FY2006 the pretrial release rate was 39 percent including immigration cases and 47 percent when excluding them. The pretrial release rate in the federal court system is at an all-time low—down from 62 percent in 1992. The most recent state court statistics from 2002 show a 62 percent release rate for felony defendants in the 75 most populous counties in the U.S., while nearly two-thirds of our local jails on an average day in this country are filled with accused persons awaiting trial—over 450,000.

In the federal court system liberty is not the norm; in fact, detention is the norm for accused persons awaiting trial (61 percent detained). In the state court system detention prior to trial or without trial is not the carefully limited exception (38 percent detained, with nearly two-thirds of our local jails consisting of accused persons awaiting trial). After considering federal and state court system data from the past 10 to 15 years we must conclude that in our society liberty is not the norm and detention prior to trial or without trial is not the carefully limited exception. It must also be acknowledged that we have veered further and further away from the achievement of pretrial justice as measured by the statement provided by Chief Justice Rehnquist. It is disheartening yet fair to say that we, as a society and a criminal justice system, have lost our way along the path toward pretrial justice. It is at this time, the time when we are the furthest from pretrial justice that we have been in decades, that we must refocus our efforts and invest our human and financial resources to put us back on the right track. Achieving pretrial justice will require a long and difficult journey—it is time to set off on our journey again and not stop until we reach our destination.

back to top

Strategies to Advance Us in Our Journey Toward Pretrial Justice

One critical strategy to advance our journey toward pretrial justice is education. We must educate our criminal justice professionals as well as our citizens on pretrial justice. The citizens of our country need to be knowledgeable about the rights of accused persons pending trial and the true purpose of bail. They must understand that our pursuit of pretrial justice—finding the proper balance between the rights of accused persons and the need to protect the community, maintain the integrity of the judicial process, and assure court appearance—will require courage, diligence, and perseverance. Education, and in some cases re-education, of our citizens and criminal justice professionals is the first crucial step toward pretrial justice.

There are undoubtedly numerous other strategies that could be used to advance us in our journey toward pretrial justice. In recognition of the Pretrial Services Act of 1982 we will focus on the strategies that can be used by pretrial services agencies. Pretrial services agencies, on behalf of the Court, strive to identify those defendants who can safely be released into the community pending trial with the least restrictive conditions necessary to assure court appearance and the safety of the community. They simultaneously work to identify the "carefully limited exception"— defendants who must be detained pending trial for the safety of individuals and our community and to assure court appearance.

Pretrial Services Legal and Evidence Based Practices (LEBP) is a developing and emerging field intended to provide guidance for policies and practices in pursuit of pretrial justice and to achieve liberty as the norm, with detention prior to trial or without trial as the carefully limited

exception. LEBP is defined as interventions and practices that are consistent with the legal and constitutional rights afforded to accused persons awaiting trial and methods that research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. Pretrial services-related research has identified a number of legal and evidence-based practices related to the pretrial investigation.

The pretrial investigation is the mechanism for relaying the necessary information to a judicial officer so that he or she can make the most appropriate pretrial release/detention decision. Recommended components of a pretrial investigation include an interview with the defendant; verification of specified information; a local, state and national criminal history record; an objective assessment of risk of failure to appear and danger to the community; and a recommendation for terms and conditions of bail.

Research has identified the use of an objective and research-based risk assessment instrument as a critical strategy for achieving pretrial justice. Pretrial risk assessment instruments should be proven through research to predict risk of failure to appear and danger to the community pending trial as well as equitably classify defendants regardless of their race, ethnicity, gender, or financial status. The results of the risk assessment instrument should be used to formulate a bail recommendation. The bail recommendation should include the *least restrictive* terms and conditions of bail that will reasonably assure that a defendant will appear for court and not present a danger to the community during the pretrial stage. Research has also identified bail recommendations that meet certain criteria as another critical practice for pretrial justice. Bail recommendations should be based on an explicit, objective, and consistent policy for identifying appropriate release conditions; be the least restrictive reasonably calculated to assure court appearance and community safety; and include financial terms of bail only when no other term will reasonably assure court appearance. Implementation of a research-based pretrial risk assessment instrument combined with an objective policy for bail recommendations is a pretrial services agency's most significant step toward pretrial justice.

Minimal research exists that identifies practices and interventions during the pretrial stage that honor the legal rights of the accused and have been proven to effectively reduce the risk of pretrial failure (failure to appear and danger to the community pending trial). Significant research is available that is applicable during the post-conviction stage of the criminal justice system. We must recognize the significant distinctions between the pretrial and post-conviction stages, including the purpose of bail, the intended outcomes of the different risk assessments, and the legal rights afforded to defendants during the pretrial stage.

For these reasons we must invest significant human and financial resources to conduct vital research in the following areas:

- refine existing pretrial specific legal and evidence-based practices,
- identify new pretrial investigation and supervision practices and interventions that are consistent with the rights afforded to pretrial defendants and have proven effective in identifying and reducing the risk of pretrial failure, and
- assess viability and conduct research when appropriate to determine the effectiveness of certain post-conviction evidence-based practices when applied to pretrial services.

Identifying and implementing legal and evidence-based practices that honor the legal and constitutional rights afforded to accused persons awaiting trial while protecting the community, maintaining the integrity of the judicial process, and assuring court appearance is the next pivotal step toward achieving pretrial justice.

back to top

Published by the Administrative Office of the United States Courts www.uscourts.gov
Publishing Information

Figure 1: U.S. District Courts Pretrial Release & Detention Rates FY 1992-2006

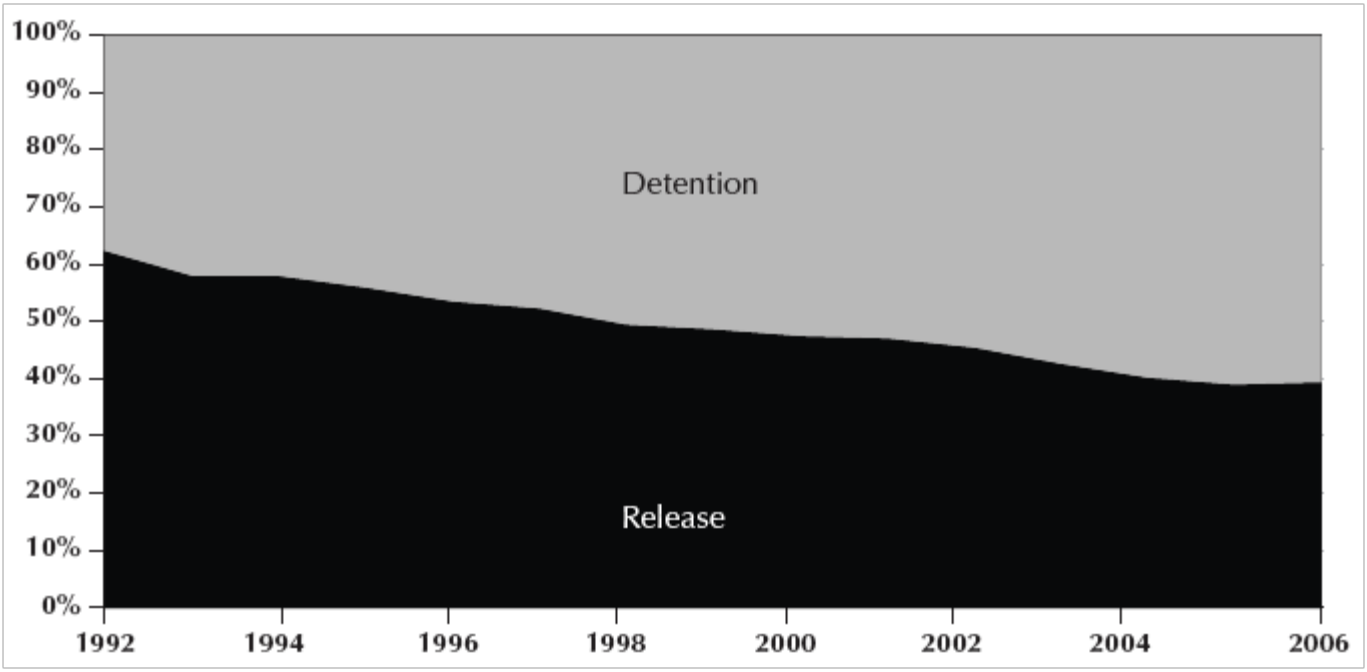


Figure 2: U.S. District Courts Pretrial Release & Detention Rates FY 1992–2006

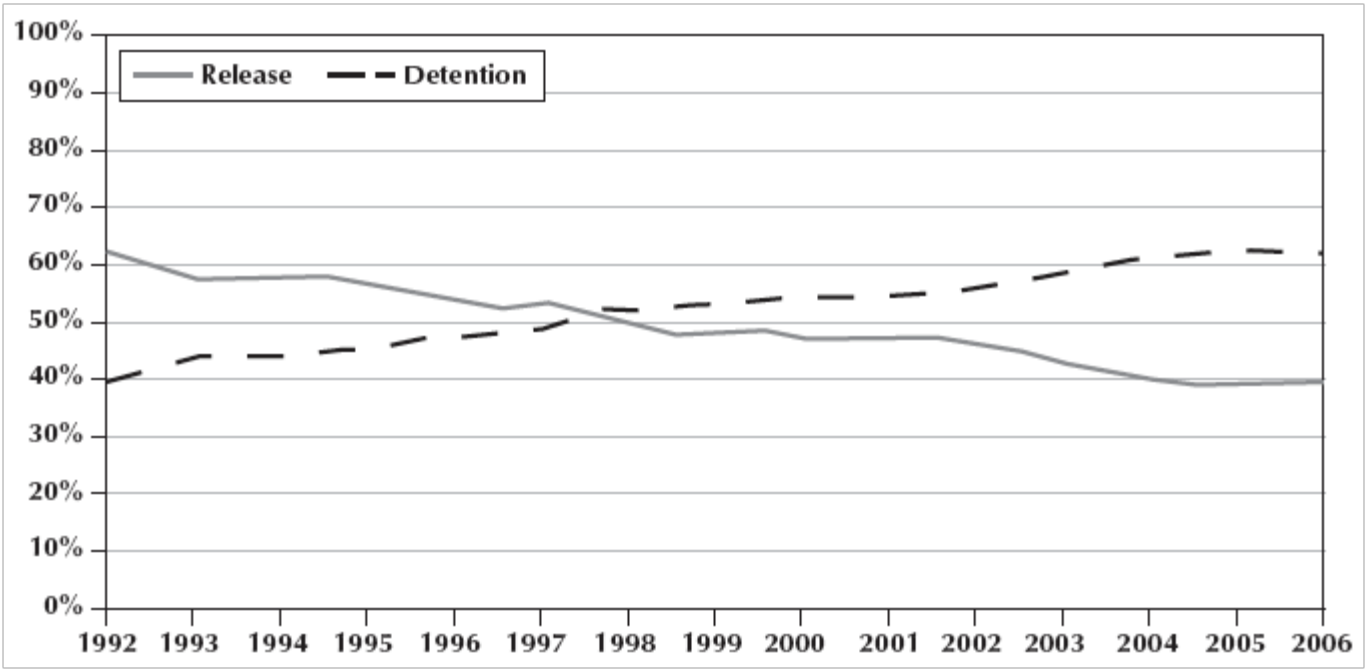


Figure 3: Felony Defendants in Large Urban Counties Release Rates 1992-2002

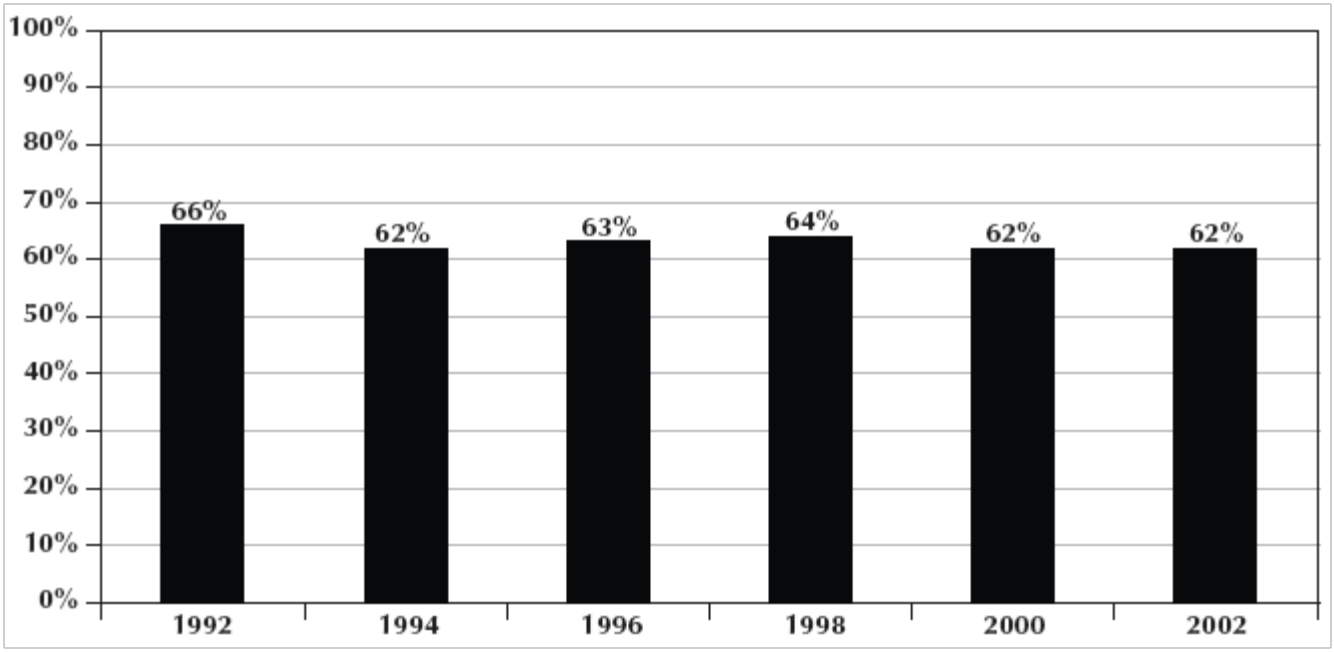
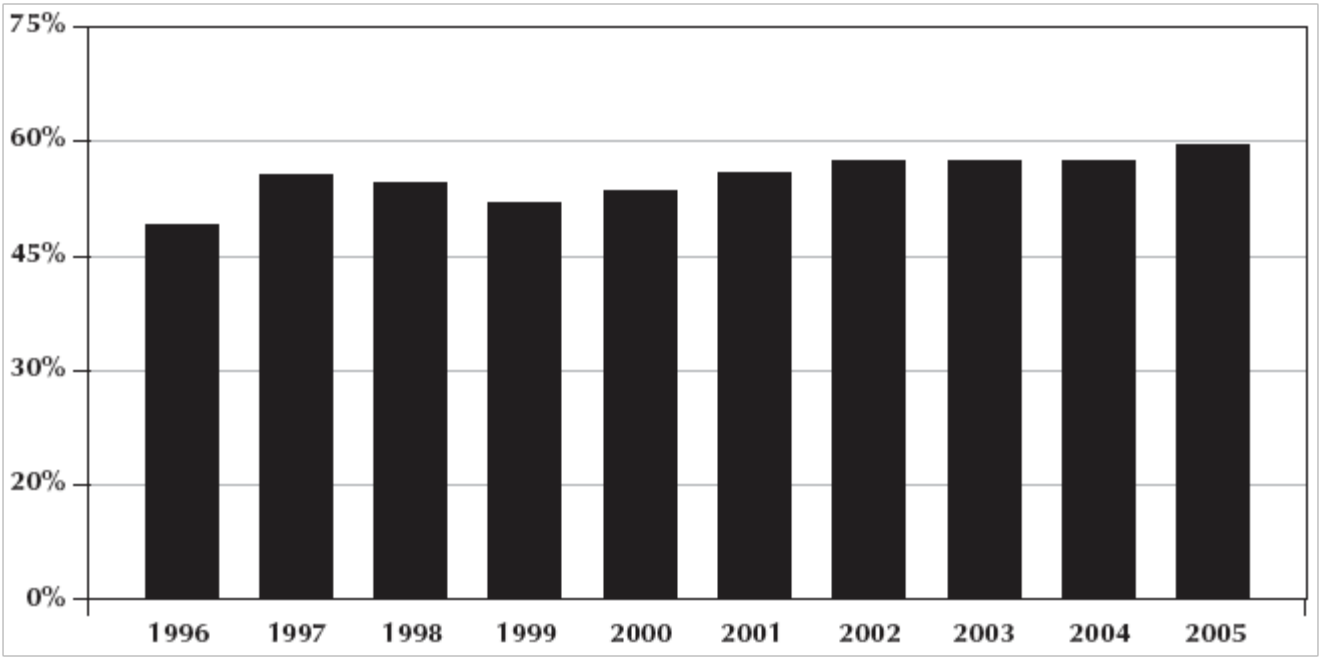


Figure 4: U.S. Jail Inmate Pretrial Population Midyear 1996-2005



Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982

[1] Sherwood-Fabre, Liese, "An Evaluation of Federal Pretrial Services Agencies Impact on Pretrial Decisions and Outcomes." NIJ October 1988.

[2] Senate Judiciary Committee "Report on the Pretrial Services Act of 1981," 97-77 (1981) p. 2.

[3] U.S. District Courts Table D-5 Defendants Sentenced (1982, 1997, 2006)

[4] New York Southern and New York Eastern have been eliminated due to the fact that they closed out very few of their activated cases in the 1984 time period and thus relevant data was not available.

Our Journey Toward Pretrial Justice

[1] Portions of this article were reprinted with permission from the monograph authored by Marie VanNostrand, Ph.D., *"Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services"* (Crime and Justice Institute, 2007).

[2] Although the term "pretrial justice" has been used for decades and can be found in print as early as 1973, a thorough literature search did not identify a definition of pretrial justice. The definition of pretrial justice provided by the authors was inspired by the United States Probation and Pretrial Services Charter for Excellence.

[3] Pretrial Services Resource Center, *The Pretrial Services Reference Book* (Washington, D.C.: Pretrial Services Resource Center, 1999) p. 10.

[4] *United States v. Edwards*, 430 A.2d 1321, (1981), cert. denied, 455 U.S. 1022 (1982).

[5] *United States v. Salerno*, 481 U.S. 739 at 755 (1987).

[6] Supra note 3, p. 12.

[7] *Coffin v. United States*, 156 U.S. 432 (1895) at 545.

[8] *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950).

[9] *Stack v. Boyle*, 342 U.S. 1 (1951).

[10] *United States v. Salerno*, 481 U.S. 739 at 755 (1987).

[11] See National Institute of Justice, *Pretrial Services Programs: Responsibilities and Potential* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2001), pp. 7-13 and Appendix A for a thorough review of the history of bail and pretrial services.

[12] Ibid, p.8

[13] Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2002* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) p. 1.

[14] Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2005* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) pp. 1 & 8.

[15] Marie VanNostrand, Ph.D. *"Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services"* (Crime and Justice Institute, 2007).

[1] As shown by the framework development flow chart, the process is iterative. All references to "completion" refer to the initial development process.

[2] *The Supervision of Federal Defendants, Monograph 111*, Chapter 1, page 2 (2007).

back to top

References

Published by the Administrative Office of the United States Courts www.uscourts.gov
Publishing Information